

## UNITED STATES DISTRICT COURT

## NORTHERN DISTRICT OF CALIFORNIA

## SAN JOSE DIVISION

12		)	Case No.: 09-CV-02708-LHK
13	JEFFREY SCHULKEN, et al.,	)	
14	Plaintiffs,	)	ORDER RE: TRANSCRIPTS
15	v.	)	
16	WASHINGTON MUTUAL BANK, HENDERSON, )	)	
17	NV, et al.,	)	
18	Defendants.	)	
		)	

19 On January 28, 2012, Appellant Donald R. Earl (“Mr. Earl”) filed a Notice of Appeal of  
20 four Orders of this Court, alleging inadequate representation by lead plaintiffs, a “disproportionate”  
21 settlement distribution, and an inadequate opt-out notice. ECF No. 238.<sup>1</sup>

22 In order to submit a complete supplemental excerpt of the record on appeal, Plaintiffs-  
23 Appellees Jeffrey and Jenifer Schulken (“Plaintiffs-Appellees”) continue to seek copies of the  
24 following transcripts: (1) October 13, 2011 Transcript of Hearing on Revised Motion to Certify  
25 Class; (2) July 19, 2012 Transcript of Hearing on Motion for Preliminary Approval of Class Action

26 <sup>1</sup> Mr. Earl appeals the Courts’ Orders: (1) granting in part and denying in part class certification,  
27 ECF No. 184; (2) granting preliminary approval of the settlement, ECF No. 210; (3) granting final  
28 approval of the settlement over Mr. Earl’s objections, ECF No. 223, and (4) denying Mr. Earl’s  
post-judgment Motion to Vacate, ECF No. 238. For further summary of the background of this  
litigation, see Order Re: Miscellaneous Motions Related to Appeal, ECF No. 259 at 2-3.

1 Settlement Agreement; and (3) November 8, 2012 Transcript of Hearing on Motion for Final  
2 Approval of Class Action Settlement. *See* ECF No. 241 at 6-7, ECF No. 262 at 5-6.

3 On April 2, 2013, this Court ordered Mr. Earl to arrange payment for the requested  
4 transcripts, or to certify an explanation of his refusal to do so within 5 days of this Order, pursuant  
5 to Circuit Rule 10-3.1(f). ECF No. 59. On April 10, 2013, Mr. Earl filed a document captioned  
6 “Objector, Donald R. Earl’s Circuit Rule 10-3.1(f) Certificate,” (“Certification”), alleging that the  
7 requested transcripts are “unnecessary,” for the appeal, and “do not aid review of the issues to be  
8 considered.” ECF No. 261.<sup>2</sup> Mr. Earl further argues that the requested transcripts are  
9 overinclusive. *See id.* at 6.

10 On April 24, 2013, Plaintiffs-Appellees filed a Response and Cross-Motion to Compel Earl  
11 to Order and Pay for Transcripts, (“Response”), ECF No. 262. Plaintiffs-Appellees argue that Mr.  
12 Earl “does not (and cannot) explain how or why Plaintiffs’ requested transcripts (of the hearings on  
13 Plaintiffs’ motions for class certification and for preliminary and final approval of the settlement)  
14 are not necessary for the resolution of his appeal of each of the Court’s Orders stemming *from*  
15 *those hearings.*” Response at 1. Specifically, Plaintiffs-Appellees argue that each requested  
16 transcript is directly relevant to the issues raised in Mr. Earl’s appeal, as enumerated below:

17 (1) Mr. Earl has appealed the class certification Order, claiming that the Court certified an  
18 overly broad class. *See* Response at 5; ECF No. 238-2, Mr. Earl’s Statement of the Issues on  
19 Appeal (“Statement of the Issues”), at 1. Plaintiffs-Appellees argue that the transcript of the  
20 October 13, 2012 hearing will show that the Court fully considered the rights of class members,  
21 including class members such as Mr. Earl, before certifying the class. *See* Response at 5.

22 (2) Mr. Earl’s appeal alleges that this Court approved a class action Settlement that violates  
23 the due process rights of the entire class and subclass. *See* Response at 6; Statement of the Issues  
24 at 2. Plaintiffs-Appellees argue that the transcript of the July 19, 2012 hearing on Plaintiffs-  
25 Appellees’ motion for preliminary approval of the settlement will reflect that the Court “carefully  
26 considered the rights of the class and relief offered under the settlement, as well as the process  
27 through which the settlement was reached.” *See* Response at 6.

28 <sup>2</sup> Neither party addresses the timeliness of this certification.

(3) Mr. Earl's appeal challenges the terms of the settlement as disproportionate. *See* Response at 6; Statement of the Issues at 2. Plaintiffs-Appellees argue that the transcript of the November 8, 2012 final fairness hearing will show that the Court fully considered Earl's objections at the fairness hearing and found them to be meritless. *See* Response at 6.

Plaintiffs-Appellees further argue that the requested transcripts are not overinclusive, because “Plaintiffs seek transcripts of hearings where the *only* topic of discussion was Plaintiffs’ motion and therefore the entire transcript may be relevant to the issues presented.” Response at 7.

In light of Plaintiffs-Appellees arguments that the three requested transcripts are necessary to the appeal and Mr. Earl's certification to the contrary, Circuit Rule 10-3.1(f) provides that the Court shall determine which party shall pay for which portions of the transcript. The Rule provides:

If appellee notifies appellant that additional portions of the transcript are required pursuant to Circuit Rule 10-3.1(b), appellant shall make arrangements with the court reporter to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not. If such a certificate is filed in the district court, with copies to the court reporter and this Court, the district court shall determine which party shall pay for which portions of the transcript.

Neither party cites any precedent that would guide the Court in determining which party shall pay for which portions of the transcript. Because the Court finds that the requested transcripts are necessary to a complete record in reviewing the issues Mr. Earl has identified in his appeal, the Court hereby orders that Mr. Earl shall immediately make arrangements to pay for the requested transcripts.

The parties shall seek any necessary extensions from the Appellate Court as provided under Circuit Rule 10-3.1 with respect to the Transcript Order deadline.

## IT IS SO ORDERED.

Dated: May 14, 2013

Lucy H. Koh  
LUCY H. KOH  
United States District Judge